Aneco, Inc. and International Brotherhood of Electrical Workers, Local Union No. 606. Case 12–CA–15738

February 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

The issue in this case¹ is whether the judge correctly dismissed the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire applicant Winston Cox. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. For the reasons that follow, we reverse the judge and find that the refusal to hire Cox was an unfair labor practice.

The Respondent is an electrical contractor in Orlando, Florida. On July 12, 1993, Winston Cox, a union business agent, arrived at the Respondent's office with three other union members to apply for electrician positions. Cox and the other union members filled out the Respondent's employment application and a test questionnaire. Cox was then interviewed by Sean Flannery, the Respondent's business manager. During the interview, Cox identified himself as a union business agent and informed Flannery that he was seeking a job with the Respondent in order to organize its employees. The Respondent did not thereafter hire Flannery.

Under the Board's Wright Line test,2 the General Counsel must first meet the burden of persuading that the Respondent acted out of union animus in refusing to hire Cox. The burden of persuasion would then shift to the Respondent to prove that it would have done the same thing even if the employee had not engaged in protected activity. Manno Electric, 321 NLRB 278, 280 (1996). "[T]he elements of a discriminatory refusal-to-hire case are the employment application . . . the refusal to hire . . . a showing that [the applicant] was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus." Big E's Foodland, 242 NLRB 963, 968 (1979).

Cox's application, the availability of jobs, the Respondent's knowledge of Cox's union affiliation, and the Respondent's animus are all quite clear here. Indeed, as to animus, the Respondent has stipulated for the purposes of this proceeding that it did not hire seven other union members interviewed on July 12 and 19, 1993, because of their union activity. Still, the judge found that the General Counsel failed to meet the initial evidentiary burden of persuasion because the evidence did not establish any nexus between the Respondent's union animus and its decision not to hire Cox. In so finding, the judge relied on Cox's own testimony about his job interview with Flannery.

Cox testified that Flannery gained the impression that Cox was going to give up his job with the Union in order to work for the Respondent at a much lower rate of pay. In fact, Cox had no such intention, but he did not correct Flannery's misimpression. Flannery further asked "why in the world" Cox would want to take a cut in pay. Cox told Flannery that he would do so in order to organize the Respondent's employees.

The judge surmised from Cox's testimony that Flannery was concerned about the "utter illogic" of an applicant leaving a substantially higher paying job in order to work as an electrician for the Respondent. From this concern emerged the conviction that, if hired, Cox would not be happy in his new job and would not stay long. The judge therefore concluded that Flannery decided not to hire Cox based solely on this misinformed belief.

We find that the record fails to support the judge's speculation. Assuming, based on Cox's credited testimony, that Flannery was under a misimpression about Cox's tenure with the Union or about the length of time Cox might stay with the Respondent, there is no basis for inferring that this played any part at all in the decision not to hire Cox.

First and foremost, Flannery himself did not rely on this factor when describing his hiring decision. Instead, he quite specifically testified that he did not hire Cox because Cox had not worked in the field for 9 years prior to the interview. Flannery testified that he felt that this hiatus indicated that Cox would not be current on safety practices, that his skills would have degraded, and that his physical stamina would have deteriorated. Flannery considered the latter factor especially important in light of the requirements of working outdoors in high temperatures during the summer.

Val Chu, Flannery's supervisor, also testified about the decision not to hire Cox. Chu likewise made no reference to a concern about the ramifications of Cox leaving a higher paying job with the Union. In reviewing and approving Flannery's decision, Chu testified that he relied on the perceived adverse effects of Cox's 9-year hiatus from active work in his trade.

¹On May 14, 1997, Administrative Law Judge Philip P. McLeod issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

²251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Finally, we note that the employment decision at issue here involves the construction industry. Work force fluctuation, frequent turnover, and short-term jobs are common in this industry. The judge himself stated, while discussing another individual's job application, that "the evidence is pretty clear that many people worked for Respondent, both on the project at Disney World and elsewhere, on a relatively short-term basis." We find this evidence further belies any reliance by the Respondent on concerns about the length of Cox's tenure with it in deciding not to hire him.

Based on the foregoing, we find that the record does not support any inference that in failing to hire Cox the Respondent actually relied on any concerns stemming from its misperception that Cox would have to leave his union job to take a job with the Respondent. We further find, based on the evidentiary factors previously recited in this decision, that the General Counsel has met the initial burden of persuading that antiunion motivation was a substantial factor in the challenged hiring decision. Finally, we find that the Respondent has failed to show that it would not have hired Cox even in the absence of his union activities. The only potentially legitimate reason actually asserted by the Respondent for its decision, an alleged concern about the adverse effects of the hiatus during which Cox did no active electrical work, cannot withstand scrutiny.

The judge credited Cox's testimony that he informed Flannery during the interview that as part of his duties as union business agent he had kept up with industry practice and that he had worked on various union pro bono work projects. The judge also found that the Respondent offered jobs to at least four applicants despite hiatuses from electrical work stretching from 3 to 12 years. The Board will conclude that if a respondent acts in a disparate manner, it is evidence that the respondent's alleged reasons for its actions are pretexts advanced to hide its true motive. John P. Bell & Sons, 266 NLRB 607, 610 (1983). Based on these findings, we find that the hiring of these applicants contradicts the Respondent's reliance on hiatus from work as a legitimate business justification to deny Cox work and indicates that the Respondent's reason was Cox's union activity. We therefore find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Cox because of his status as a union business agent.

REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily refused to hire Winston Cox, we shall order it to offer him employment in the same or a substantially equivalent position for which he had applied, without prejudice to any seniority or any other rights or privileges to which he would have been entitled in the absence of the Respondent's hiring discrimination. Additionally, we shall order the Respondent to make him whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination practiced against him from the date he applied for employment to the date that the Respondent makes him a valid offer of employment. Such amounts shall be computed in the manner prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with New Horizons for the Retarded, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Aneco, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Discriminating against employee applicants because of their union affiliation or activity by refusing to hire them.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Winston Cox employment in the job to which he applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if he had not been discriminated against.
- (b) Make Winston Cox whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire, and within 3 days thereafter notify Winston Cox in writing that this has been done and that the discrimination will not be used against him in any way.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Orlando, Florida facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 9, 1993.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminate against employee applicants because of their union activity by refusing to hire them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Winston Cox employment to the job for which he applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if he had been hired.

WE WILL make Cox whole for any loss of earnings and other benefits resulting from the discrimination against him, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Winston Cox, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discrimination will not be used against him in any way.

ANECO, INC.

Evelyn M. Korschgen, Esq., for the General Counsel.William E. Sizemore, Esq. (Thompson, Sizemore & Gonzalez), for the Respondent.Joseph Egan Jr., Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Tampa, Florida, on January 21–23, 1997. On April 29, 1994, an order consolidating cases, complaint, and notice of hearing issued. On August 17, 1994, the original date set for hearing was postponed indefinitely. The matter was later reset for hearing. The complaint issue before me alleges that Aneco, Inc. (Respondent) failed and refused to hire Winston Cox on its motel construction project at the Disney World complex in Orlando, Florida, because Cox was a business agent of International Brotherhood of Electrical Workers, Local Union No. 606 (the Union).

In its answer to the consolidated complaint, Respondent admitted certain allegations, including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the conclusion of the trial, following oral argument by the parties, I delivered a bench decision pursuant to Section 102.35 of the Board's Rules and Regulations, in which I found that Respondent had failed and refused to hire Cox because of his position with the Union.

On a detailed review of the transcript and further reflection, I was not convinced that in reaching my bench decision, I gave proper consideration and proper weight to certain uncontested facts which are more fully described here. Accordingly, I issued an order vacating the conclusions reached in my bench decision that counsel for the General Counsel had established a prima facie case of discrimination, that Respondent had not shown it would have refused to hire Cox regardless of his position with the Union, and that Respondent unlawfully discriminated against Cox. In doing so, I vacated only these legal conclusions-not the findings of fact articulated in my bench decision. Indeed, it was the facts as found, including uncontested facts described below, which caused me to vacate these legal conclusions. In my Order, I invited the parties to file briefs on these issues. Thereafter, on or about March 20, all parties filed timely briefs which

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

have been duly considered. On the entire record in this case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

A. Cox's Application and Employment Interview

In my bench decision, I note that in describing the employment interview which Winston Cox had with Respondent's project manager, Sean Flannery, there were no substantial differences between the testimony of Cox and Flannery. I then describe and make findings of fact (at pp. 393–398) relevant to that interview, which I adopt here, as follows:

Mr. Flannery testified that in the interview with Mr. Cox, he took approximately 10 minutes in the interview with Mr. Cox, that he discussed the application which Mr. Cox had filed, and we'll look at that application in a few moments; that he asked Cox what a business agent was, and that Mr. Cox described generally his duties as a business agent. Mr. Flannery testified that in that conversation and in Cox describing what he did, it came out that Mr. Cox was in what was essentially an office position. Mr. Flannery observed that Mr. Cox had not worked in the field for the last 9 years. Someplace in his testimony Flannery said 9 months, but it was clear he was referring to 9 years.

Mr. Flannery testified in essence that he could not remember specific questions that he asked of Mr. Cox in the interview, and could not remember specific responses that Mr. Cox had given. He testified that he made the decision not to hire Mr. Cox then and there, during the interview, and at one point in his testimony, Mr. Flannery testified he told Cox, during the interview, that he could not hire him for a position with our firm. . . .

Mr. Flannery testified that he did not hire Mr. Cox due to a lack of experience in the field during the last 9 years and he elaborated that, in his view, that lack of experience in the field during the last 9 years came with a degradation of skills and, according to Mr. Flannery, "safety concerns." Mr. Flannery admits that he may have told Mr. Cox during the interview that Mr. Cox was qualified enough to take his, Flannery's, own job. Mr. Flannery admitted that, during the interview with Cox, he was aware that Respondent did not want to be organized, did not want to have its employees organized by a union.

Mr. Flannery did not remember asking Cox about other specific work experience, whether it be teaching in electrical trades or working on a nuclear reactor or working on industrial jobs. . . . Mr. Flannery testified that in the interview with Mr. Cox they did discuss the fact that an office environment is air conditioned. Flannery testified he commented that air conditioning was much nicer than working in the field. I note Mr. Flannery did not claim that Mr. Cox agreed with him or said anything himself about the issue.

Elsewhere in his testimony, Mr. Flannery testified that he said to Mr. Cox sometime during the interview, and presumably near its conclusion, "I can't hire you; there are better applicants." Mr. Cox does not directly

deny that statement. I credit Mr. Flannery insofar as he testified that during the interview he told Mr. Cox that he could not or would not hire him. I do not credit Mr. Flannery he told Mr. Cox that there were better applicants.

I am well aware of the fact that that is not specifically denied by Mr. Cox, although he did testify he couldn't recall it being said. However, it seems ultimately incongruous with the fact that Mr. Flannery did state to Mr. Cox that Mr. Cox was overqualified and in fact was so qualified that he might even take Mr. Flannery's position.

Except as I have just indicated . . . with regard to that specific remark, I do credit Mr. Flannery's testimony in general. Mr. Flannery did testify credibly that he had never heard of salting before this interview with Mr. Cox; he had never heard of the comet program; he had never been trained in union prevention.

Mr. Chu testified that he did review Mr. Flannery's decision with regard to Mr. Cox, and he found that he would have made the same decision. Mr. Chu testified that someone who was away from the craft 9 years would not be hired because of concern—and Mr. Chu focused primarily on deterioration of muscles. My analysis of Mr. Chu's testimony is that he mentioned more in passing than in substance any particular concern about the deterioration of skills as such.

Mr. Cox testified, for the most part credibly, and insofar as $I\ldots$ do not indicate otherwise, I do credit his testimony. Mr. Cox testified particularly credibly and in detail, much more detail than Mr. Flannery, about the interview that took place when Mr. Cox first applied for work.

Mr. Cox testified that when he first went into the interview, Mr. Flannery told Cox that he had done very well on the test that had been given to him, considering the time that Mr. Cox had not been in the field. Mr. Cox responded that he kept up with what was going on in the industry, and that he had volunteered on various projects that the union has done on a pro bono basis.

Mr. Cox testified that Mr. Flannery then turned to the application and suggested that they review the application, whereupon Mr. Flannery asked Mr. Cox exactly what a business agent was. . . . Mr. Cox explained that—what he did as a business agent, and generally what those duties involved. Mr. Cox testified credibly that at that point he asked Mr. Flannery if he would be offered a job. Mr. Flannery did not respond. Mr. Cox then asked again whether he would be offered a job. Mr. Flannery asked what license Mr. Cox had. Cox told him of his licenses and then, again, asked Flannery if he was going to offer him the job.

I credit Mr. Cox that at that point Mr. Flannery said that Mr. Cox seemed to be overqualified for what the company had in terms of work. The subject then changed to the question of wages. Mr. Flannery told Mr. Cox that he was not—that the company was not really looking for anyone in Mr. Cox's wage range, but instead they were looking for people in the \$9 range. Mr. Cox asked if that was a job offer. Mr. Flannery said it was not.

According to Mr. Cox, he then told Mr. Flannery that he would entertain any job offer Mr. Flannery was willing to make. I don't credit that in its entirety. It is clear from the affidavit that Mr. Cox gave during the investigation of this case that he did tell Mr. Flannery during the discussion that he would consider any electrician's position, and I find that is what Mr. Cox said to Mr. Flannery.

Mr. Cox did testify credibly that he said to Mr. Flannery in this . . . interview, that he was there for the specific purpose of seeking a job with Respondent in order to organize its employees. Mr. Cox admits that, throughout the interview, Mr. Flannery expressed some doubt about Mr. Cox's ability to work in the field. Mr. Cox also admits that Mr. Flannery did say, why would you take a big reduction in pay, or words to that effect.

It is clear from the testimony of Mr. Cox that during this interview, Mr. Flannery was under the impression, which we now know was a clearly erroneous impression, that Mr. Cox was applying for work with the Respondent with the intention of leaving his job as business agent of the union. Whether Mr. Flannery expected to demand of Mr. Cox that he quit or not, or whether Mr. Flannery thought Mr. Cox was simply willing to quit in order to take this job doesn't really matter. It's clear that Flannery was under that misimpression. And I'll discuss the significance of that later on.

B. Cox's Qualifications

I then discuss (at pp. 398–403) facts relevant to Cox's qualifications and ability to perform the type of work then being done by Respondent's employees in building a motel at the Disney World complex in Orlando, Florida. I adopt and affirm those findings here:

Charles Bright testified credibly in this proceeding that he worked for the Respondent for a period of four or five months; that during his first interview with the Respondent, he was asked if he had been in a union. Mr. Bright responded yes, but he had dropped his ticket. During that interview, Mr. Bright was offered employment on the spot. Mr. Bright testified credibly that the average age of people working for Respondent on the Disney World job was something in the range of 25 to 30 years old, but that there were other people who were as old or older than 40, and perhaps people as old as 50. I note from my own observation of Mr. Bright that he was heavyset.

Mr. Joe Peckinpaugh also testified credibly in this proceeding that he worked for Respondent on the All Star job, which is the Disney World job which we're concerned with here, for approximately four months. Mr. Peckinpaugh testified very credibly in describing the job, that it was a simple rough-in job; that he did not do any heavy lifting, but that some others did. From that, I conclude that both heavy lifting was available and assigned to some people, but that it was not required of everyone.

I also note, however, that in describing what heavy lifting meant, Mr. Peckinpaugh referred largely to the

installation of an object . . . weighs in the range of 25 to 30 pounds, not hundreds of pounds.

Stated in its simplest terms, Mr. Peckinpaugh testified credibly that this job was hot, but that the work was easy. That's really what his testimony boiled down to in describing the work of the job. Mr. Peckinpaugh testified that his age was approximately—it was 53, and my own observation of Mr. Peckinpaugh is that he was slight in build, short in stature.

Turning now to the documentary evidence in this case, and I'm not going to describe all of the documentary evidence by any means, but I am going to describe and refer specifically to the evidence which I think is particularly significant. The parties have stipulated that, in General Counsel Exhibit 8, some information concerning the average temperatures and average maximum temperature which shows that the average maximum temperature for the work site during the months of July and August ran approximately 91 to 92 degrees. That's consistent with Mr. Peckinpaugh's testimony that the work was hot, and I think we've all come to acknowledge that in this proceeding.

General Counsel's Exhibit 3, sub exhibit 1 is the employment application for Winson Cox. It's the application which was available to and discussed in the interview on July 12. I note in that application several specific entries. Obviously, in describing his employment history, the only entry Mr. Cox made was that he was a business agent of Local 606, and had been since 1984. When describing his duties, he described them as organizing and negotiations.

However, I also notice that in the application where Mr. Cox was asked to describe education and training, Mr. Cox specifically stated that he had received electrical training at the JATC and in question number 8 when Mr. Cox was asked if he had ever completed an apprenticeship program, he answered yes, and again provided the Central Florida JATC. In question number 9, Mr. Cox was asked if there were any other specialized training that he had and he said yes, he had training in "welding, motor control."

In item number 10, Mr. Cox was asked if there was any equipment or machines that he could operate which would be helpful in performing the job for which he was applying, and Mr. Cox wrote, "have operated most equipment and machines in the everyday task of performing the job done as an electrician." General Counsel's Exhibit 5 is a copy of the test which Mr. Cox took in conjunction with his application for employment, and as testified to by both Mr. Flannery and Mr. Cox—well, more specifically by Mr. Flannery, then Mr. Cox. But he did miss something in the neighborhood of three-and-a-half questions on General Counsel's Exhibit 5.

I note that there is evidence of at least one individual, a Jeff Gardner, on General Counsel's Exhibit 14 who missed substantially more questions than Mr. Cox. There is no indication, in fact there is no real claim by the Respondent, that the number of questions which Mr. Cox missed played any significant part in the decision not to offer Mr. Cox employment. That's well and good. But I think another conclusion can be drawn

from General Counsel's Exhibit 5, when taken with the discussion which ensued during the interview, one can, and I do conclude that Mr. Cox demonstrated a knowledge of information which would ordinarily be required of journeyman electricians employed by the Respondent.

I also note, by the way—I don't think I specifically commented on this before, and will do that now, that I do credit the testimony of Mr. Cox that in the interview with Mr. Flannery, the subject of Mr. Cox having worked on two motels which were similar to the Aneco project at Disney World did come up, and Mr. Cox described that to Mr. Flannery.

C. Union Animus

The issue of Respondent's animus toward union activity was handled by stipulation. The complaint as originally issued named in addition to Cox, seven other individuals as discriminatees, all of whom were rank-and-file union members. Long before this case came on for trial, Respondent entered into a settlement agreement with the Regional Director for Region 12 of the Board settling and resolving all issues related to those other alleged discriminatees. That settlement agreement also resolved the issue of union animus, as discussed in my bench decision (at pp. 400–401):

With regard to General Counsel's Exhibits 2 and 3, 2 being the settlement agreement, I note on page 3 of this, as I have already, the language which reads the charged party and the Charging Party now agree and stipulate that, solely for the purpose of and use at any future hearing relating to discriminatee Winson J. Cox, the parties will then stipulate and enter into the record before an Administrative Law Judge the following: "On or about July 12, 1993, Aneco, Inc. did not hire employee applicants James Bieber, Rufus Leon Blackman, and Albert L. Weber because they were union activists, and on or about July 19 Aneco, Inc. did not hire employee applications Wilfredo Cuevas, Jerome Damron, Larry W. Kidd, and John Offineer because they were union activists." Those stipulations are repeated, in essence, in General Counsel's Exhibit 3.

With regard to General Counsel's Exhibit 3, counsel for General Counsel and the Charging Party argue that, from that stipulation, two things can be inferred: one, animus, and two, that the animus was a motivating factor in Respondent's decision not to offer Mr. Cox a position. Respondent concedes that this stipulation is an admission, that a logical inference can be drawn that Respondent harbored animus, and the document is definitely used for that purpose, and I do infer animus from the document.

D. Disparate Treatment

I then turned to and discussed at length (at pp. 405–410) the evidence offered by counsel for the General Counsel to show disparate treatment. I adopt and affirm those findings:

General Counsel's Exhibit 12 is the application of Michael Spess. The evidence in that application shows that Spess had been out of the field for a while, but was, nevertheless, hired by the Respondent. However,

the application shows that Mr. Spess had only been out of the field 15 months. And moreover it shows that Mr. Spess had been a former employee of the Respondent.

The application of Mr. Spess is an element which weighs a little bit in both directions and in the long run is not itself particularly significant. I do note, as counsel for Respondent points out, Mr. Spess was hired as a helper position, not as an electrician position, as well. Moving on, General Counsel Exhibit 11 is the application of a Dan Fisher. The application shows that Mr. Fisher had been out of the field, so to speak, for two years. Specifically it shows that he had been out of work for two years.

Insofar as a deterioration of skills is concerned, out of work and out of the field may as well be the same thing, and I do take that as another element that Respondent was willing to hire people who had been out of the field for some period of time. The question becomes—and we will see later on the question becomes how long.

My overall conclusion about General Counsel Exhibit 11, the application of Fisher, is that it is somewhat borderline. It's another example of Respondent being willing to hire someone out of the field but it's of questionable significance because we're only talking about two years. Moreover, I note that Mr. Fisher was a former employee and the evidence does show that Respondent had a state of preference for hiring former employees, and therefore that application is of borderline significance.

The application of Frank Shultz, General Counsel's Exhibit 6. This is an application which I conclude falls into the same category as the first two. It is borderline or arguable; it is of borderline or arguable significance. That's not to say it's insignificant. That's simply to say that it's, in and of itself, not something that I would want to rely on in reaching a decision in this case. I also note the testimony of the witnesses is undisputed that Shultz was not hired as an electrician journeyman or otherwise, but was hired to pull telephone cable and computer wiring and that his position was somewhat different from that of other people.

I do not place as great significance as Respondent would like me to on the fact that Shultz was applying only for a summer job short term. I think the evidence is pretty clear that many people worked for Respondent, both on the project at Disney World and elsewhere, on a relatively short-term basis.

Larry Smith's application, General Counsel's Exhibit 16, tends to fall in the same borderline category, except to one extent. Insofar as his experience is concerned and whether he was removed from the field for any significant period of time, I find the application borderline. However, I do draw one significant conclusion from it, and that is I note on the application that Mr. Smith applied for a position as foreman at \$11 an hour.

He was hired as—he was offered employment and hired as an electrician, not necessarily as a foreman, and from that and other evidence which I will discuss in a moment, it is apparent to me that the Respondent did not necessarily either offer someone a position for which they applied or not at all. Rather, the evidence

shows that it was not unusual for the Respondent to offer someone a different position from which they were expressly applying.

General Counsel's Exhibit 16 is the application of Charles Davis, and it is an application which I find is of much more significance than the others. Davis, the application shows, had been out of the field three years. He was offered employment by the Respondent and he was hired as a helper. While I recognize the distinction between the helper position that he was hired at and the electrician position for which Mr. Cox applied, there is no reason to conclude that Mr. Flannery, under normal circumstances, might not have offered Mr. Cox a lesser position than that for which he was applying.

General Counsel's Exhibit 7 is the application of Jeffrey Long. That is very significant, and more significant, in fact, than that of Mr. Davis because General Counsel Exhibit 7 shows that Mr. Long had been out of the field four years. Although he had been out of the field four years, he applied for an electrician position and I conclude was hired at an electrician position.

Mr. Long is one of those who was hired at the conclusion of a—as he puts it in his application—commitment to the Department of Corrections. Now, I do not want my decision here in any way to be read to discourage Respondent from employing people who are coming out of jail or prison and who have qualifications which the Respondent can utilize. That is an admirable thing for the Respondent to do. But that does not necessarily mean that there is some special circumstance which either precludes or suggests that we should not compare those individuals to Mr. Cox.

And while the Respondent suggests that these are particularly desirable people because coming out of the Department of Corrections they are much more likely to show up for work regularly and so forth than other people, there's no evidence to indicate that the Respondent had any reason to believe that Mr. Cox would not show up for work on a regular basis and remain employed and work hard. So to point that out is comparing—is simply not comparable.

I note, too, that on the comments for office use, when Mr. Long was hired, it is specifically acknowledged by the Respondent that Mr. Long had been "out of circulation for the past few years."

The application of John McInerney entered as Respondent's Exhibit 1 is significant in that it shows Respondent was willing to offer someone employment even though they had been out of the field as much as 12 years, which Mr. McInerney had been. The significance of Respondent's Exhibit 1 is diminished, to some extent, by the fact that Mr. McInerney was only applying for an electrician's helper position and that in fact that is all that he was hired for.

However, insofar as counsel for General Counsel's burden of proof, clearly she has established that someone who is out of the field is nevertheless not precluded from employment altogether by Respondent. Turning now to General Counsel's Exhibit 15, which is the application of David Farthing, that application is significant in several respects. One is the fact that the application shows Mr. Farthing had been out of the field from

March, 1991 through August, 1996 when he was applying for work, namely a period of five years and five months.

The application also shows that his most recent job had been at Walgreen's stocking shelves. So far as I know, Walgreen's are air conditioned facilities. Point number three shows that he had worked at Home Depot as a stock person in electrical sales. So for all practical purposes, the application shows that he had been in a similar situation to Mr. Cox simply for a shorter period of time, namely five years and five months rather than the much greater period that Mr. Cox had been.

I also note in General Counsel Exhibit 15 that he applied for work as an electrician at \$12 an hour. If you look at GC-15, under the part that it says for office use only, it says position applied for: helper, which is clearly inconsistent with the face of the application where he says he applied for a position as an electrician. I am inclined to conclude from that that he was offered a position as helper. But in any event, it is clear that he applied for a position of electrician, and was at least hired by Respondent.

It also shows that he was hired at the rate of \$10 an hour, even though he asked for \$12 an hour. So it's pretty clear that the Respondent was willing to offer some of these applicants something different than that for which they applied both in position and in rate of pay.

E. Availability of Positions

I then addressed (at pp. 410–411) the issue of whether Respondent had positions available and was hiring employees at the time of Cox's application. I adopt and affirm those findings:

I think it's real clear in this case that there are positions that were available. General Counsel's Exhibit 10 shows that the Respondent was hiring throughout the time of the Walt Disney project. Mr. Chu, Mr. Flannery testified that hiring was still going on in the past recent months, even as the project winds down.

General Counsel's Exhibit 9 and General Counsel's Exhibit 17 show that not only were there positions available, but that, in fact, there was hiring by the Respondent in the position of electrician within the 90-day period which, according to the application for employment of Mr. Cox, would have been the time during which the application would have remained on file.

General Counsel's Exhibit 9, first page, item 49, the name James Mumblow, page 2, employee number 81, Michael Vanover; in the UCF Student Union project, employees 3 and 4, William Rogero and Larry Smith; on the All Star Commercial project, employee Henry Delgado, Phil Higginbotham, Raymond J-u-v-e-r-a, Harold Kincaid, Norman McDonald; and on the third page, James Munoz and Michael Spess and Donald Stewart. General Counsel's Exhibit 17 similarly shows four names, two on page two and two on page three of individuals hired within the 90-day period of Mr. Cox applying for work with Respondent.

Analysis and Conclusions

In my bench decision, I concluded (at p. 403) that counsel for the General Counsel had established Cox's union activity, or in this case his position with the Union; Respondent's knowledge of Cox's position; and Respondent's animus toward union activity. I also concluded (at pp. 411 and 412) that counsel for the General Counsel had established disparate treatment of Cox vis-a-vis other applicants who had been away from the electrical trade for various periods of time, as Cox had been. Based on those four factors, I concluded (at p. 411) that counsel for the General Counsel had established "the burden of proof under *Wright Line* in showing that his position with the Union was a motivating factor" in Respondent not hiring Cox.

I concluded (at p. 412) that the burden of proof shifted to Respondent "to show that Cox would not have been offered a job regardless of his union activity." I then stated, "And, quite frankly, that's where this case becomes difficult. The reason it becomes difficult at that stage is that the evidence shows, unequivocally, Mr. Flannery was laboring under a very significant misimpression about what was going to happen in terms of Mr. Cox's employment with the Respondent." I then discuss at some length the fact the record shows that Flannery was under the misimpression—and Cox knew Flannery was under the misimpression—that Cox would be quitting as business agent of the Union in order to go to work for the Respondent.

The reason I decided to vacate my bench decision is that in reviewing the transcript, I came to the realization that the proper place to consider Flannery's misimpression that Cox was going to quit his job as business agent to take a job with Respondent was as a part of counsel for the General Counsel's burden of proof under Wright Line, 251 NLRB 1083 (1980), not as a part of the burden of proof which shifts to Respondent if and when counsel for the General Counsel's burden is met. Rather than consider Flannery's misimpression in conjunction with or as a part of Respondent's burden of proof, as I clearly did, the proper place to consider it is in deciding whether counsel for the General Counsel has met its initial burden of proof in establishing a prima facie case of discrimination. Flannery's misimpression goes to the element of Cox's union position—the reason advanced by counsel for the General Counsel as the unlawful motivating factor in Respondent not hiring Cox. It also goes to the issue of motivation and disparate treatment for reasons expressed below.

After a thorough review of the record, I am convinced that when one factors in Flannery's misimpression, and reviews the entirety of Cox's employment interview with Flannery in the light of that misimpression, it becomes abundantly clear that Cox's position with the Union played no part in Flannery not hiring Cox. It is significant that Flannery's misimpression was expressly made known to Cox during the employment interview, and Cox did nothing to correct Flannery's misimpression. Cox's own testimony shows that a major topic of conversation between Flannery and Cox was the difference between Cox's earnings as business agent and the fact that Respondent was offering people only about \$9 an hour. Cox himself testified Flannery asked Cox why he would step down from or leave such a good paying job in order to come to work for the Respondent.

As noted in my bench decision, it is evident from the testimony of both Flannery and Cox, but particularly of Cox, that Flannery was very concerned, not for discriminatory reasons, but for very legitimate business reasons, whether or not Cox would remain employed very long, if, in fact, he took a job with the Respondent. As I specifically note, Flannery was also concerned, for legitimate business reasons, about whether or not Cox would be a happy or contended or productive employee. The record is quite clear that all of these logical and legitimate concerns expressed by Flannery were premised on the honest—albeit mistaken—belief that Cox was going to quit as union business agent to take a job with Respondent.

It is appropriate to consider the entire record in determining whether counsel for the General Counsel has met its burden of establishing a prima facie case. Williams Contracting, 309 NLRB 433 (1992). It is appropriate to consider all the facts, not just the facts most favorable to counsel for the General Counsel. The Board as well as the courts require proof of a nexus between the elements of the General Counsel's case before the inference will be drawn that unlawful motivation played a part in a respondent's decision, thereby causing the burden of proof to shift to respondent under Wright Line. When elements of the General Counsel's prima facie case are significantly impaired by testimony of its own witness, both the prima facie case itself and the required nexus connecting them falters. J. E. Merit Constructors, 302 NLRB 301 (1991).

When one considers the known facts from Flannery's perspective—which is the position from which they must be analyzed to determine whether there was discriminatory intent—one sees that Flannery's concern was perfectly legitimate because what Cox was proposing made absolutely no sense. When one puts all the pieces of the puzzle together—not just some of them—it becomes abundantly clear that it was not Cox's position with the Union, which Flannery thought Cox was going to quit, but rather the utter illogic of what Cox was apparently proposing that was the motivating factor behind Flannery's actions.

Further, while counsel for the General Counsel did present evidence discussed in detail above tending to show that Respondent "discriminated" against Cox in the sense of treating him differently from some other applicants for employment who had been away from the electrician's trade for varying periods of time, the record is abundantly clear that not one of those other applicants applied for work with Respondent at a time when they were gainfully employed elsewhere making in excess of \$30,000 and proposing to quit that job to come to work for Respondent. Thus, Flannery's honest—albeit mistaken—belief about Cox's intentions tends to undermine not only the issue of unlawful motivation, but the issue of whether Cox was really similarly situated to these other individuals, and therefore whether Respondent really treated Cox in a disparate manner.

In this instance, I conclude that counsel for the General Counsel's own witness provides convincing evidence disproving one or more critical elements of the General Counsel's case, and the required nexus between them. Consequently, an inference is not warranted that protected conduct was a motivating factor in Respondent's decision, and the burden of proof never shifted to Respondent under the *Wright Line* test. As there is no reasonable basis for conclud-

ing that union membership or position was a factor influencing Respondent not to hire Cox, as required by *Wright Line*, the complaint should be dismissed.

[Recommended Order for dismissal omitted from publication.]